87-1836

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JOHN S. HERRINGTON, as Secretary of the;
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the restrictions imposed by the Bonneville Power Administration ("BPA") on access to the Pacific Intertie so affect rates charged California for nonfirm energy as to require compliance with Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Northwest Act"), 16 U.S.C. § 839e(k).

2. Whether the restrictions imposed by the BPA on access to the Pacific Intertie constitute unlawful discrimination against electric utilities in California under Section 6 of the Pacific Northwest Consumer Power Preference Act ("Regional Preference Act"), 16 U.S.C. § 837e, and Section 6 of the Federal Columbia River Transmission System Act ("Transmission System Act"), 16 U.S.C. § 838d.

3. Whether the restrictions imposed by the BPA on access to the Pacific Intertie conflict with its responsibility to maintain competition to the maximum extent possible.

LIST OF PARTIES

The parties to the proceeding below were petitioners the California Public Utilities Commission ("CPUC") and the California Energy Resources Conservation and Development Commission ("CEC") and respondents the BPA, James J. Jura as Administrator of the BPA, John S. Herrington as Secretary of the United States Department of Energy, and the United States of America.

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for the Ninth Circuit

The CPUC hereby petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 831 F.2d 1467 and reprinted in the Appendix (hereinafter "App.") at A1-28.

JURISDICTION

The Court of Appeals entered judgment on November 6, 1987. It denied timely petitions for rehearing on February 4, 1988, in an order reprinted in the Appendix at C1-25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to the present proceeding are 16 U.S.C. §§ 825s, 832a(b), 832c(a), 837(c), 837a, 837e, 838(d), and 839e(k). Each of these provisions is set forth verbatim in the Appendix at K1-6.

STATEMENT OF THE CASE

1. Development of the Pacific Intertie

Longstanding interest in electrically interconnecting the Pacific Northwest with California culminated in 1964. That year the United States Department of the Interior submitted to Congress a plan for the design, construction, and use of such an interconnection. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Cong. & Ad. News at 3389. Under this plan, the federal government would construct and operate most of the project in the Pacific Northwest, and various public agencies and privately-owned utilities would be responsible for that portion to be built in Nevada and California. *Id.* at 3390. The essential elements of this plan were approved by Congress through passage of the Public Works Appropriations Act of 1964, Pub.L. 88-511, 78 Stat. 682, and signed into law by the President on August 30, 1964.

A final obstacle blocking realization of this project was the requirement of Section 4(a) of the Bonneville Project Act, 16 U.S.C. § 832c(a), that, without geographical qualification, the BPA give preference to public agencies in its sale of electrical power. App. at D3. As a consequence, privately-owned utilities in the Pacific Northwest expressed concern that their access to such power would be curtailed by sales to public agencies in California. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3343-3344. Of particular concern was

the prospect that such agencies without their own sources of generation would become increasingly dependent on the BPA. *Id.*

The resulting stalemate was broken by passage of the Regional Preference Act, 16 U.S.C. §§ 837 *et seq.* Under Section 1(c) of this statute, the BPA is limited in the sale to California of electrical energy generated at federally-owned hydroelectric facilities in the Pacific Northwest to that energy which "would otherwise be wasted because of a lack of market therefor in the Pacific Northwest at any established rate." 16 U.S.C. §§ 837(c), 837a (App. at D2). As a consequence, California may only purchase from the BPA such electrical energy for which no need whatsoever exists in the Pacific Northwest.

Today, under the plan approved by Congress, the Pacific Northwest-Pacific Southwest Intertie ("Pacific Intertie") consists of two 500 kilovolt, alternating-current ("AC") lines and one 1000 kilovolt direct-current ("DC") line. The two AC lines extend from the John Day Substation near the Columbia River at the border between Oregon and Washington to the Lugo Substation in southern California, a total distance of 945 miles. The DC line extends from the Celilo Converter Station in northern Oregon through central Oregon and Nevada to the Sylmar Converter Station in southern California, totaling some 846 miles in length.

2. History of the Interregional Market

On January 13, 1969, the BPA entered into a contract, entitled the "Exportable Energy Agreement," with fourteen generating utilities in the Pacific Northwest. App. at M1-27. By this agreement, these parties created a scheme for allocating the capacity of the Pacific Intertie during such times when streamflows in the Pacific Northwest exceed the capability of reservoirs in that region to store additional water for future use. During these conditions of spill, the BPA first provides sufficient capacity to fulfill certain, pre-existing contractual commitments. *Id.* at M11. The remaining capacity is then apportioned to each signatory according to its relative share of the total amount of surplus energy the signatories are willing to sell at the rate to be charged by the BPA. *Id.* at M11-12.

Over the next several years, depending on conditions of supply and demand in the Pacific Northwest, an active interregional market developed. When streamflows were large in the Pacific Northwest, a substantial quantity of electrical energy was available for sale to California; conversely, when streamflows were low in that region, little if any became available. At all times other than during conditions of spill, access to the Pacific Intertie was provided to any seller in the Pacific Northwest or Canada that could arrange a transaction with California.

More recently, however, changing economic conditions in the Pacific Northwest have created a continuous surplus of electrical energy. Expectations of rapidly-growing demand failed to materialize, and many generational projects were either temporarily halted or completely abandoned. *See City of Springfield v. Washington Public Power Supply System*, 752 F.2d 1423, 1426 (9th Cir. 1985). Others were completed, but have gone underutilized. Under these conditions, the BPA and utilities in the Pacific Northwest began to compete even more actively among themselves to sell surplus energy to California.

At the same time, as the bill for these various projects came due, the costs incurred by the BPA to serve its customers in the Pacific Northwest increased greatly. In response to this situation, and in particular to hold down the rates charged its regional customers, the BPA undertook a systematic program to collect greater revenues from California. As part of this program, the BPA has several times since 1978 established new, higher rates to be charged California.

On September 7, 1984, following receipt of written comments, but without conducting any formal, evidentiary hearing, the BPA instituted a comprehensive plan governing access to the Pacific Intertie. App. at D1-26. By this plan, called the Interim Near Term Intertie Access Policy ("Interim NTIAP"), the capacity of the Pacific Intertie not required by the BPA to support the needs of its "power marketing program" is first used to fulfill various contractual commitments. App. at D19-22. Any remaining capacity is then selectively apportioned under three different conditions, depending on the amount of surplus power available in the Pacific Northwest for sale to California:

Condition 1. During times of spill in the Pacific Northwest, when surplus energy would be wasted if not immediately sold to California, access to the Pacific Intertie is provided pursuant to the Exportable Energy Agreement. App. at D23.

Condition 2. When the Exportable Energy Agreement is not in effect, but the supply of surplus energy nonetheless exceeds the available capacity of the Pacific Intertie, access is apportioned among the BPA and utilities in the Pacific Northwest according to the relative share of the total amount of surplus energy each declares to be available for sale to California at any price. App. at D23-24. Expressly excluded from the Pacific Intertie under this condition are extraregional sellers, such as those in Canada. App. at D25.

Condition 3. When the supply of surplus power is less than available capacity, access for the BPA and utilities in the Pacific Northwest is provided without restriction. App. at D24. Under this condition, any remaining capacity is then, but only then, provided to extraregional utilities. App. at D25.

3. Proceedings Before the Ninth Circuit

On September 19, 1984, the Department of Water and Power of the City of Los Angeles ("LADWP") filed a petition with the Ninth Circuit for review of the Interim NTIAP. Contemporaneously, LADWP filed a motion for stay of the Interim NTIAP pending judicial review and for an order establishing a schedule for expedited briefing of the underlying petition. In its brief supporting this motion, the LADWP rested its challenge to the Interim NTIAP on the grounds (a) that it unlawfully discriminates against California and (b) that it violates the federal antitrust laws.

On December 6, 1984, the CPUC and the CEC each filed a petition with the Ninth Circuit for review of the Interim NTIAP.

On April 24, 1985, a panel of the Ninth Circuit issued an opinion denying LADWP's petition. *LADWP v. BPA*, 759 F.2d 684 (App. at B1-25). According to the court, Congress intended

that the BPA be allowed preference in the transmission of federal power over the Pacific Intertie in order to ensure its ability to operate in a "fiscally selfsupporting" manner. *Id.* at B20. Parenthetically, the court noted that "the antitrust laws do not apply to the federal government." *Id.* The court then ruled that, since it is designed to mitigate "significant revenue shortfalls" which the BPA would otherwise experience, the Interim NTIAP was both authorized and mandated. *Id.* In addition, the court found that, after reserving sufficient capacity on the Pacific Intertie to serve its own purposes, the BPA is free to allocate any remaining amount as long as it does so in a fair and nondiscriminatory manner. *Id.* at B21. Finally, the court concluded that, inasmuch as Congress expressed no intention to the contrary, the BPA has discretion to determine the conditions under which it will transmit electrical power for utilities in Canada. *Id.* at B23.

On June 1, 1985, again without conducting any formal, evidentiary hearing, the BPA instituted the Revised Near Term Intertie Access Policy ("Revised NTIAP"), not significantly different in its terms from the Interim NTIAP. App. at G1-22. On August 2, 1985, the CEC filed with the Ninth Circuit a petition for review of the Revised NTIAP. On August 26, 1985, the CPUC did likewise. On September 9, 1985, the Ninth Circuit consolidated these two petitions with the petitions filed by the CPUC and the CEC for the review of the Interim NTIAP.

On November 6, 1987, a second panel of the Ninth Circuit issued an opinion denying the petitions of the CPUC and the CEC. *CEC v. BPA,* 831 F.2d 1467 (App. at A1-28). First, the court rejected arguments that the Revised NTIAP constitutes ratemaking, concluding that only the prices charged by nonfederal sellers, and not those by the BPA, are affected. App. at A11. Next, with respect to the discriminatory effects of the Revised NTIAP, the court believed itself bound by the opinion dismissing LADWP's petition. *Id.* at A14. Finally, the court concluded that the Revised NTIAP's anticompetitive effects are justified by the need of the BPA to meet its financial obligations. *Id.* at A20. In dissent, Judge Norris found that the Revised NTIAP represents unjustified discrimination in favor of utilities in the Pacific Northwest:

> I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anticompetitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and non-discriminatory" in its treatment of all utilities, 16 U.S.C. § 838d, as well as the clear understanding recognized in [*LADWP v. BPA*] that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

Id. at A26-27.

REASONS FOR GRANTING THE WRIT

This case poses ramifications of enormous magnitude for California, the Pacific Northwest, and the entire United States. Most immediately, if the decision below is allowed to stand, and the BPA can continue to exert monopolistic control over the interregional market, consumers throughout California will have to pay several hundred million dollars more each year than they would under a system of open access to the Pacific Intertie. Over the longer term, as the anticompetitive practices of the BPA cease to make it any longer an economic, reliable source of supply, and California is forced to turn to the increased development of its indigenous resources, the interregional market will suffer a severe and lasting decline. For the United States as a whole, a dangerous precedent will be established, enabling federal proprietary agencies to charge with impunity whatever their markets will bear whenever they can control the transmission of electrical power.

Such a result would be particularly egregious in view of the role Congress intended the BPA to play in accommodating, not usurping, use of the Pacific Intertie. The failure of the Ninth Circuit to confront this fact, together with its too ready willingness to excuse the BPA from carrying out its responsibility of maintaining competition to the maximum extent possible, must be redressed. Indeed, by its refusal to recognize the full effect of

the Revised NTIAP on prices charged California, that court has rendered illusory the protection Congress intended the Federal Energy Regulatory Commission ("FERC") provide against the BPA's regional bias.

In sum, this case presents issues of national importance involving public policy and the construction of major federal statutes which demand this Court's authoritative resolution. In view of its refusal to undertake an independent analysis of those statutes, its disregard of the rights of California to receive fair access to the Pacific Intertie, and its immediate and lasting effect on the interregional market, the decision below must be reversed. Given the bias of the BPA in favor of the Pacific Northwest and the Ninth Circuit's acquiesence in that federal agency's exercise of discretion beyond that granted by Congress, review by this Court represents the final opportunity to reverse a result as unjust as it would be fiscally improvident.

I

THE NINTH CIRCUIT OVERLOOKED THE INEXTRICABLE LINK BETWEEN THE ALLOCATIONAL SCHEME CREATED BY THE REVISED NTIAP AND PRICES CHARGED CALIFORNIA.

In rejecting the contentions of the CPUC and the CEC that the BPA's institution of the Revised NTIAP constitutes ratemaking, the court below concluded that review by the FERC would not further the purposes of Congress in enacting the Pacific Northwest Act. App. at A10. Quite to the contrary, however, such review is an essential element of the protection Congress intended California be provided against the BPA's bias in favor of the Pacific Northwest. *See Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1113 (9th Cir. 1984). Thus, under Section 7(k) of the Pacific Northwest Act, 16 U.S.C. § 839e(k) (App. at K5), the FERC is directed to determine whether any rate or schedule established by the BPA for the sale of electrical energy to California would "encourage the most widespread use of Bonneville Power" at "the lowest possible rates to consumers consistent with sound business principles." *U.S.*

States Department of Energy, Bonneville Power Administration, 37 FERC ¶ 61,278 at pp. 61,836-7 (1986). As the FERC has explained the vital importance to California of such review,

> Section 7(k) was intended as a unique check on the [BPA's] ability to set non-firm rates outside the Pacific Northwest Region in order to assure that the [BPA] complies with the pre-existing statutory requirements in designing such rates.

U.S. Secretary of Energy, Bonneville Power Administration, 20 FERC ¶ 61,292 at p. 61,558 (1982); see also *Central Lincoln Peoples' Utility District v. Johnson, supra*, 735 F.2d at 1113.

These requirements apply just as certainly to any change proposed by the BPA regarding the availability of any schedule it has previously established for the sale of electrical energy. *Portland General Electric Company v. Johnson*, 754 F.2d 1475, 1484 (9th Cir. 1984). Indeed, by fundamentally affecting rates charged and services provided, any such change constitutes the very essence of ratemaking. *Id.* at 1481. Moreover, in reviewing any such change, the FERC must consider the totality of the circumstances and not just the direct effect on rates. *CEC v. BPA*, 754 F.2d 1470, 1474 (9th Cir. 1985).

When the totality of the circumstances surrounding the BPA's institution of the Revised NTIAP are fully considered, the conclusion is inescapable that rates charged California by the BPA have been substantially affected. As freely acknowledged by the BPA, the Revised NTIAP is intended to enhance its ability to collect greater revenues from California, and thereby reduce the rates that its customers in the Pacific Northwest would otherwise be charged. App. at A13, n. 2. The BPA accomplishes this by allocating the capacity of the Pacific Intertie to itself and various utilities in the Pacific Northwest on the basis of fixed, proportionate shares. On this basis, since no seller in the Pacific Northwest, either federal or nonfederal, can increase its allocation, any incentive to reduce price is severely reduced. App. at B13. In this way, bolstered by the exclusion of Canadian utilities, real competition is effectively eliminated.

This effect is most obvious under Condition 1 when the Revised NTIAP establishes an artificially high price below which neither the BPA nor any utility in the Pacific Northwest may sell nonfirm energy to California. In fact, just one month prior to instituting the Interim NTIAP, the BPA notified its cosignatories that thenceforward it would, contrary to all prior practice, apply its highest generally available rate for the sale of nonfirm energy to California under the Exportable Energy Agreement. App. at N1. As a result, by restricting the flexibility, and thus the competitiveness, of utilities in the Pacific Northwest, the BPA is now able to charge the highest rate possible to California even during those times of spill when competition should be the greatest.

As an additional consequence, by changing the conditions under which access had previously been provided to the Pacific Intertie, the Interim and Revised NTIAPs have directly affected the amount of nonfirm energy which can be sold to California. Thus, by allocating fixed portions of the capacity of the Pacific Intertie to utilities in the Pacific Northwest, the BPA has limited the amount of nonfirm energy which it can sell to California. Furthermore, under the Revised NTIAP's scheme for providing access, if the BPA or any other seller in the Pacific Northwest refuses to use the full amount of its allocated capacity, the Pacific Intertie will be underutilized, and surplus energy in the Pacific Northwest wasted—all for the purpose of insuring that the BPA and utilities in the Pacific Northwest can charge the highest price possible in each transaction with California. As observed by Judge Norris in his dissent,

> To the extent that northwest utilities [and the BPA] are under no obligation to use their pro rata share of intertie access, the BPA's interim plan also acts as a restriction on output. Output restrictions, like restrictions on price competition, raise prices above the competitive market level. Thus, the interim access policy—suppressing both price and output—is a double curse for southwest utilities and energy consumers.

App. at A26, n. 2.

Accordingly, contrary to the opinion of the court below, by substantially affecting both the price and amount of electrical energy sold to California, the BPA's institution of the Interim and Revised NTIAPs is inextricably related to ratemaking. As a result, pursuant to Section 7(k) of the Pacific Northwest Act, the BPA was required to submit any plan it might develop governing access to the Pacific Intertie to the FERC for confirmation and approval. In view of the BPA's failure to comply with this requirement, including a demonstration that the most widespread use of federal energy would be encouraged at the lowest possible rate to consumers in California, neither the Interim nor the Revised NTIAP can be considered legally valid. Moreover, unless the decision below is reversed, the protection which Congress intended California receive against the bias of the BPA in favor of the Pacific Northwest will be rendered meaningless.

II

THE NINTH CIRCUIT ERRED IN FAILING TO ADDRESS THE DISCRIMINATORY EFFECTS OF THE REVISED NTIAP ON CALIFORNIA.

In refusing to consider whether the Revised NTIAP unlawfully discriminates against California, the court below believed itself bound by the determination in *LADWP v. BPA, supra*, App. at B25, that " 'BPA is required to allocate use of federally-owned transmission facilities in a manner which accords first preference to transmission of federal power and then to transmission of other Northwest-generated power.' " App at A14-15. As explained in the legislative history of the Regional Preference Act, however, the BPA's authority to reserve capacity on the Pacific Intertie is not unlimited:

> In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably foreseeable may be included, but [the BPA] may not decline to enter into wheeling agreements merely because [it] may have energy available for sale to serve the same load.

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News at 3350. Thus, the BPA may reserve

sufficient capacity to meet reasonably foreseeable as well as current needs —"so long as the agency does not compete with other utilities on the mere speculation that it 'may have energy available' sometime in the future to sell to the same customer." App. at B17.

Once its legitimate needs have been met, the BPA is directed to transmit electrical energy for any utility which can arrange a transaction over the Pacific Intertie. As provided by Section 6 of the Regional Preference Act,

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in Section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

16 U.S.C. § 837e (App. at K1). Similarly, under Section 6 of the Transmission System Act, such capacity must be made available "on a fair and nondiscriminatory basis." 16 U.S.C. § 838d (App. at K2). Taken together, these statutes oblige the BPA to act as a carrier fairly and without discrimination.

This obligation applies equally to utilities in the Pacific Northwest and Canada—that is, to the transmission of electric energy from a "generating plant in the Pacific Northwest or Canada." 16 U.S.C. § 837e; *see also* dissent of Judge Norris, App. at A25, n.1. As the legislative history of the Regional Preference Act further explains,

> [The BPA] may enter into agreements for the wheeling of energy generated in Canada, *but such energy stands on the same basis as any other non-Federal energy*. It does not have the priority granted to Federal energy and Canada's entitlement to downstream power benefits under the proposed treaty.

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News at 3350 (emphasis added). Thus,

although standing in line behind federal energy and Canada's entitlement to such "downstream power benefits," energy generated in Canada must be treated the same as "any other non-Federal energy."

Properly understood, therefore, the BPA's discretion regarding operation of the Pacific Intertie is closely constrained. In the first place, notwithstanding the needs of its "power marketing program", the BPA is authorized only to reserve an amount of capacity on the Pacific Intertie equal to the electrical energy it has actually arranged to sell to California. Any capacity remaining after the BPA has met its legitimate needs must then be made available to any utility in the Pacific Northwest or Canada that can arrange a transaction with California. After all, Congress intended that the Pacific Intertie be used at least in part for the benefit of utilities in California. App. at B23. As explained by Judge Norris,

> The exclusion of Canadian power, though arguably unobjectionable in its discrimination against Canadian producers, also discriminates against southwest energy purchasers—intended beneficiaries of the Intertie.

App. at A25, n.1.

In direct contravention of these statutory requirements, the BPA has instituted a scheme designed to deny utilities in California fair access to their counterparts in the Pacific Northwest and Canada. Thus, by allocating capacity for itself and utilities in the Pacific Northwest on the basis of fixed, proportionate shares, and by excluding utilities in Canada except during Condition 3 when they pose no competitive threat, the BPA has acted to usurp rather than accommodate use of the Pacific Intertie. In turn, the refusal of the court below to undertake an independent analysis of the statutes applicable to the BPA will lead inevitably, if not reversed by this Court, to immediate and lasting harm to California and the entire interregional market. Such a result, unlawfully discriminatory in its design and economically shortsighted in its effect, must not be allowed to stand.

III

THE NINTH CIRCUIT WRONGLY EXCUSED THE BPA FROM CARRYING OUT ITS RESPONSIBILITY TO MAINTAIN COMPETITION TO THE MAXIMUM EXTENT POSSIBLE.

Although recognizing that the BPA is required to consider the interests of competition in allocating the capacity of the Pacific Intertie, the Ninth Circuit concluded that the BPA's primary obligation is to be fiscally self-supporting. App. at A15-16. In so doing, however, the Ninth Circuit wrongly excused the BPA from carrying out its responsibility of maintaining competition to the maximum extent possible consistent with the public interest. *See Otter Tail Power Company v. United States*, 410 U.S. 366, 374 (1973). Indeed, at no time has the BPA demonstrated why its fiscal needs cannot be met without resort to monopolistic control over the Pacific Intertie. Nor has it explained why the exercise of such control is necessary to protect utilities in the Pacific Northwest from competition. Under such circumstances, "the reviewing court must closely scrutinize [the agency's] action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws." *Gulf States Utilities Company v. Federal Power Commission*, 411 U.S. 747, 763 (1973).

That the Interim and Revised NTIAPs represent nothing less than an attempt to exert monopolistic control over the Pacific Intertie is beyond dispute. App. at A16. Thus, by allocating capacity on the basis of fixed, proportionate shares, these policies have effectively eliminated competition in the sale of electrical power to California. App. at A26, B13. As a result, the BPA and utilities in the Pacific Northwest are now able to charge the highest price possible in each transaction with California.

Such a result is in direct contravention of the intent of Congress that the BPA further, not impede, competition. Thus, under Section 2(b) of the Bonneville Project Act, the BPA is directed "to encourage the widest possible use of all electric energy that can be generated and marketed" and "to prevent the monopolization thereof by limited groups." 16 U.S.C. § 832a(b) (App. at K2). Similarly, Section 5 of the Flood Control Act of 1944 provides that the BPA "shall transmit and dispose of such . . . energy in such manner as to encourage the most widespread use

thereof at the lowest possible rates to consumers consistent with sound business principles. . . . " 16 U.S.C. § 825s (App. at K3).

The BPA cannot escape these requirements by asserting that its financial difficulties are a consequence somehow of its failure to collect sufficient revenues from California. Rather, no matter from which group of customers revenues are collected, the BPA's total costs are exactly the same. *Central Lincoln Peoples' Utility District v. Johnson, supra*, 735 F.2d at 1115. Consequently, greater revenues from California serve only to reduce rates which would otherwise be charged customers in the Pacific Northwest.

In sum, the need of the BPA to be fiscally self-supporting does not relieve it from maintaining competition to the maximum extent possible. By failing to scrutinize closely the BPA's development of the Interim and Revised NTIAPs, however, the decision below permits the creation of a series of monopolies for the BPA and utilities in the Pacific Northwest. Such a result not only denies utilities in California fair use of the Pacific Intertie but directly contravenes the statutory scheme established by Congress. As pointed out by Judge Norris,

> The BPA's pro rata allocation scheme for available intertie capacity—a scheme which if implemented by a private party would plainly violate the antitrust laws—paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities.

App. at A25-26.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

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